No. 85-568

In The

Supreme Court of the United States

October Term, 1985

NANTAHALA POWER AND LIGHT COMPANY, TAPOCO, INC., AND ALUMINUM COMPANY OF AMERICA,
Appellants,

v.

STATE OF NORTH CAROLINA *ex rel.* UTILITIES COMMISSION; LACY H. THORNBURG, Attorney General, et al.,
Appellees.

On Appeal from the Supreme Court of North Carolina

APPELLEES' MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM JUDGMENT OF THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

In response to the decision of this Court in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), Congress enacted the Federal Power Act (16 U.S.C. §§ 791a., *et seq.)*. As previously noted by this Court,[1] the intent of Congress in this Act was to create a "bright line" between the Federal Power Commission ("FPC" — now the Federal Energy Regulatory Commission or "FERC") and the various state regulatory commissions, such as the North Carolina Utilities Commission ("NCUC"). The FERC was given exclusive jurisdiction over interstate, wholesale electric power sales and over the transmission of electric energy in interstate commerce (16 U.S.C. § 824(b)). The FERC has no authority to regulate retail, intrastate electric rates and charges. That authority was reserved to the states and to state commissions such as the NCUC. In an earlier opinion involving most of the same parties and facts now before this Court (but a different legal issue), the U.S. Court of Appeals for the Fourth Circuit stated, with respect to the NCUC Order here challenged, that such Order "on its face sets only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and does not directly conflict with FERC's wholesale and interstate rate setting power."[2] With this in mind, Appellees respectfully submit that this Appeal now presents the following question for decision by the Court:

I. DOES THE ORDER OF THE NORTH CAROLINA UTILITIES COMMISSION, AS AFFIRMED BY THE NORTH CAROLINA COURT OF APPEALS AND THE NORTH CAROLINA SUPREME COURT, PRESENT A SUBSTANTIAL FEDERAL QUESTION?

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1 *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964).

2 *Aluminum Company of America v. Utilities Commission*, 713 F.2d 1024, 1030 (4th Cir. 1983); *cert. denied*, 104 S. Ct. 1326 (1984).

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STATEMENT OF THE CASE

A proper resolution of this matter requires the Court to fully understand four things: first, what Alcoa did from 1900-1981; second, what the NCUC did in 1981 and 1982; third, what the FERC did in 1981 and 1982; and, fourth, what the North Carolina Supreme Court did in 1985. The Appellants[3] (and their allies) have omitted most of the relevant facts and have incorrectly characterized the opinions of the NCUC,[4] the FERC and the lower Courts. Appellees will fill in this void. We shall show that Appellants, as they have consistently attempted to do before the NCUC and the lower Courts, both state and federal, are trying to present to this Court a case that does not exist and never did. By omission[5] and mischaracterization, Appellants would have this Court believe

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[3] Aluminum Company of America (hereafter, "Alcoa"); and its two wholly-owned subsidiaries Nantahala Power and Light Company ("Nantahala" or "NP&L") and Tapoco, Inc. ("Tapoco"). These three Appellants are sometimes referred to, collectively, as "the Companies."

[4] e.g., that the NCUC "investigated" and "disapproved of" FERC filed and approved rates, Jurisdictional Statement ("J.S."), p. 2, n.1; that the NCUC "refused to allow recovery of the wholesale costs allocated to Nantahala by the FERC rate schedules", J.S., p. 4; and that the NCUC reallocated the "economic benefit of this power as if the FERC-regulated New Fontana and 1971 Apportionment Agreements did not exist" by giving a "first call" on all the low-cost hydro power to Nantahala's retail customers, J.S., p. 9.

[5] In their Jurisdictional Statement, Appellants never present to this Court one word about the Alcoa power system that existed in western North Carolina and eastern Tennessee for over 40 years prior to the New Fontana Agreement. Further, they never present one word about the four fundamental findings of fact on which the NCUC's entire opinion is predicated. Their allies also decline to present the facts.

that the NCUC and the North Carolina Supreme Court have, through ignorance or by design, run roughshod over prior opinions interpreting the Federal Power Act and the Supremacy and Commerce Clauses of the United States Constitution. **This simply is not so.**

The procedural history of this case, including the reversal of the NCUC's erroneous 1977 decision by the North Carolina Supreme Court — *Utilities Commission v. Edmisten*, 299 N.C. 432, 263 S.E.2d 583 (1980) — is concisely presented in the preamble to that Court's lengthy opinion here under review (Appellants' Appendix ("App.") pp. 13a-18a). Upon remand, after joining Alcoa and Tapoco as parties, the NCUC found, based upon substantial evidence: (1) that Tapoco was a North Carolina public utility; (2) that the Nantahala and Tapoco electric systems constituted a *single*, unified, electric public utility system for ratemaking purposes; (3) that, pursuant to N.C.G.S. 62-3(23)2, Alcoa was a North Carolina public utility due to its effect on the rates and services of Nantahala; and (4) that Alcoa so dominated Nantahala that Nantahala " . . . has been left but an empty shell, unable to act in its own self-interest, let alone in the interest of its public utility customers in North Carolina."[6] (App. pp. 178a-179a.) Based upon these essential findings of fact, the NCUC determined the rate base and expenses of the single Nantahala-Tapoco system, allocated the appropriate costs to Nantahala's North Carolina retail jurisdiction, and set retail rates such that there was a rate

[6] These, of course, are the four fundamental findings of fact referred to in footnote 5, *supra*. As we have noted, Appellants do not see fit to mention any of them.

reduction from the level previously approved. Consistent with the rate reduction, Nantahala was ordered to refund the excess rates it had been collecting. Alcoa, due to its domination, was ordered to refund such portion of the total refund amount as Nantahala was financially unable to make.

Upon appeal by the Companies, the North Carolina Court of Appeals and the North Carolina Supreme Court affirmed all relevant Commission orders. *Utilities Commission v. Edmisten,* 65 N.C. App. 198, 309 S.E.2d 473 (1983); *Utilities Commission v. Edmisten,* 313 N.C. 614, 332 S.E. 2d 397 (1985). Meanwhile, Alcoa and Tapoco, but not Nantahala, had filed a complaint in the United States District Court for the Eastern District of Tennessee, seeking to enjoin the NCUC. The complaint was transferred to the United States District Court for the Eastern District of North Carolina, which granted a motion to dismiss on abstention grounds. This ruling was unanimously affirmed by the Fourth Circuit, *Aluminum Company of America v. Utilities Commission,* 713 F.2d 1024 (4th Cir. 1983), *cert. denied,* 104 S. Ct. 1326 (1984). The Fourth Circuit recognized that the NCUC's order, on its face, did not directly conflict with FERC's wholesale and interstate rate setting power.

STATEMENT OF FACTS

The opinion of the North Carolina Supreme Court and the NCUC's initial Order each contain a lengthy description of the factual history of this matter (App. pp. 13a-32a and 166a-235a). These facts are unique in the electric power industry. An implicit assumption of Appellants' Jurisdictional Statement is that the "Alcoa power system" is indistinguishable from a traditional electric power company or holding company system such as the Southern System or the Middle South System. This is not true. The only apparent reason for Appellants' reluctance to discuss the actual facts of this case is that they completely undercut Appellants' legal arguments. The principal facts determined by the NCUC and affirmed by the North Carolina Supreme Court are the following:

1. In the early 1900's, Alcoa came to North Carolina seeking low-cost power to serve its aluminum reduction plant in Alcoa, Tennessee (App., p. 18a).

2. Rather than acquiring land in its own name, Alcoa acquired two existing public utility companies, Knoxville Power Company ("Knoxville", later, Tapoco) in Tennessee and Tallassee Power Company ("Tallassee", later Carolina Aluminum, Inc., still later Yadkin, Inc.) in North Carolina (App. pp. 18a, 22-24a).

3. During the 1920's, through the use of these public utility subsidiaries, Alcoa acquired substantial control of the major hydroelectric sites located along the Little Tennessee River in North Carolina and Tennessee (App. p. 18a).

4. Despite the fact that it already owned Knoxville and Tallassee, Alcoa created Nantahala, in 1929, as yet

another wholly-owned public utility subsidiary. Between 1929-1939, Tallassee sold its undeveloped hydroelectric sites to Nantahala (App. p. 19a), while it kept the low-cost Cheoah and Santeetlah sites (which had already been developed and which Alcoa subsequently caused to be conveyed to Tapoco).

5. Between 1929 and 1941, Nantahala undertook token public service (App. p. 19a). Most of Nantahala's power was sold to Alcoa. In 1941, Nantahala obtained a certificate from the War Department to construct the Nantahala and Glenville hydroelectric projects. The stated justification for such certificate was Alcoa's huge electric needs. The Nantahala and Glenville projects were repeatedly referred to as being a part of the "Alcoa power system" (App. p. 19a).

6. Also in 1941, both Alcoa (through Nantahala) and the Tennessee Valley Authority (TVA) were interested in developing a large hydroelectric project at Fontana, North Carolina. After a determination by FPC that the project would require a license under Part I of the Federal Power Act ("the Act"), Nantahala abandoned the project.[7]

7. Subsequently, Alcoa and TVA entered into the original Fontana Agreement ("OFA"). Under this Agreement, Alcoa caused Nantahala (which was not even a party to the OFA) to transfer the Fontana site to Alcoa, at less than fair market value, in exchange for downstream

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[7] This was by no means the only instance in which Alcoa attempted to avoid submitting its facilities or those of its subsidiaries to regulation by the FPC. See, e.g., *Nantahala Power and Light Co.*, 2 F.P.C. 388 (1941); also App. pp. 19-20a (n5), 22-23a, 29a, 31a.

storage benefits to Tapoco. Nantahala, Tallassee (by then, Carolina Aluminum) and Knoxville were compelled to turn over all the output of their hydroelectric plants to TVA in exchange for TVA return power entitlements, most of which flowed to Alcoa. At that time, Nantahala's public load could easily be satisfied out of the TVA return power allocated to Nantahala. The balance of Nantahala's return power was sold to Alcoa at "dump" (i.e., below cost) prices (App. pp. 20-21a). In 1954, Alcoa and Nantahala signed a contract which required Nantahala to sell its excess power to Alcoa at very low rates. The 1954 contract also called for Alcoa to make power available to Nantahala when Nantahala could not meet its public service obligations.

8. The OFA was never submitted to the FPC as a rate schedule or ruled upon by FPC, for its lawfulness, during its entire 20-year term (App. p. 22a).

9. In 1954, FPC ruled that the Cheoah and Santeetlah (N.C.) and Calderwood (Tenn.) facilities would have to be licensed under Part I of the Act. Alcoa subsequently caused Knoxville Power to change its name to Tapoco, Inc. and caused Tapoco to domesticate in North Carolina. Tapoco thereby succeeded Knoxville as owner of the Calderwood dam. In October, 1954, Tapoco and Carolina Aluminum (formerly Tallassee, subsequently Yadkin, Inc. — the owner of the Santeetlah and Cheoah dams) jointly applied to FPC for a Part I license for the "Tallassee Project". By June, 1955, Tapoco had become the licensee of the "Tallassee Project" (App. p. 24a).

10. As part of its FPC license filing, Tapoco was required to comply with all applicable state laws. In February, 1955, Tapoco applied to the NCUC for a state public

utility certificate. The certificate which was issued by the NCUC has never been abandoned, revoked, or amended and it directs Tapoco to make certain power available for Nantahala and its customers (App. p. 25a).

11. Tapoco later sold its distribution facilities and freed itself from any further responsibility to the public in Tennessee. Tennessee has not, thereafter, exercised any regulatory control over Tapoco.[8] Since 1955, almost all of Tapoco's TVA return power entitlements have been devoted to Alcoa's private aluminum production facilities. Some five years later, Alcoa tried to shed its remaining public responsibility by selling Nantahala's distribution system (but not its hydro dams and projects) to Duke Power Company. This attempt was rejected by the North Carolina Supreme Court, since it was not shown to be in the public interest. *Utilities Commission v. Membership Corporation*, 260 N.C. 59, 131 S.E. 2d 865 (1963); (App. pp. 25-26a, 28-29a).

12. Nantahala added generation during the 1950-1955 period to allow it to provide more power to Alcoa. Despite its increasing public load, Nantahala has added no generating capacity to its system since 1957 (App. p. 26a).

13. During the period 1940-1950, Nantahala sold over 80% of its power to Alcoa at very low rates. By 1953, this relationship between Alcoa and Nantahala was held to

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[8] Thus, the suggestion made by Tennessee, on p. 9 of its *Amicus Curiae* brief, which hypothesizes a decision by the Tennessee PSC to set Tapoco's retail rates on a roll-in basis is, at best, merely whimsical; at worst, it is deliberately misleading.

have resulted in discrimination against Nantahala's retail customers.[9]

14. From the beginning of the OFA (1941) through the end of the test period in this case (1975), Alcoa always had to purchase some, at times the greater part, of its power requirements from TVA. In 1975, for example, while Alcoa purchased 1,365,499,000 kwh from Tapoco, it purchased an additional 1,784,833,000 kwh from TVA (App. p. 25a).[10]

15. From 1960-1962, Alcoa and TVA negotiated the New Fontana Agreement ("NFA") to succeed, in part, the OFA. The Agreements were similar, with all the Nantahala and Tapoco generation being turned over to TVA, in exchange for TVA return power entitlements designed

[9] In its opinion in *Utilities Commission v. Mead Corporation*, 238 N.C. 451, 78 S.E. 2d 290 (1953), the North Carolina Supreme Court discussed this discrimination. Nantahala sought to increase its rates for all customers, *except* Alcoa, even though Alcoa got more than 80% of Nantahala's power, at rates which were less than the cost of producing the power. Other large industrial customers were paying rates approximately double Alcoa's rate. Nantahala's attempt to distinguish between "primary" and "secondary" power was held to be a distinction without a difference. The North Carolina Supreme Court rejected Nantahala's attempt to give an unlawful preference to Alcoa.

[10] Alcoa complained below that the "cost" of its separate power purchases from TVA should have been put into the single system "pot" and allocated to Nantahala and Tapoco. The NCUC's well-reasoned response to this assertion was twofold: (1) since the supplemental purchase contract was a separate matter between Alcoa and TVA (Tapoco was not a party), this power was not available for use in the Nantahala-Tapoco single system and should not be included in the single system "pot"; and, (2) since the power sold under the contract was "customer specific" (i.e., tailored to meet Alcoa's high load factor needs and not the fluctuating needs of the public load), all costs attributable to such power would have to be allocated directly to Alcoa, even if such costs properly belonged in the single system "pot" (App. pp. 211a-215a; 66a-67a).

to serve a high load factor customer (such as an aluminum smelter) and not a public load (App. pp. 28-29a).

16. Just as with the OFA, the NFA[11] left it to the Companies to determine how to divide the power and energy. This was initially done in a 1963 Agreement which guaranteed Nantahala the greater of its annual "primary energy capability" (360,000,000 kwh) or its actual annual generation (which averaged 424,000,000 kwh). There was no demand limitation on Nantahala's use of its return power entitlements. Unlike the previous 1954 Alcoa-Nantahala agreement, no obligation was imposed upon Alcoa to make up any shortfall when Nantahala's power was insufficient to meet its public load (App. pp. 29-30a).

17. From 1963-1971, Nantahala was still selling power to Alcoa. Thereafter, Nantahala had no excess power to sell. Alcoa caused Tapoco and Nantahala to enter into a new 1971 Apportionment Agreement.[12] Under this 1971 Agreement, Nantahala's share of the NFA entitlements was reduced to only its primary generation (360,000,000 kwh). In addition, a demand limitation of 54,300 KW was placed on Nantahala's use of its return power entitlements. All of the remaining NFA entitlements were allocated to Tapoco, for Alcoa's benefit. In addition, Alcoa ceased making the $89,000 annual payment to Nantahala which it had made under the 1963 Agreement. As a result of its growing public load and the 1971 Agreement's

[11] The NFA was not filed at FPC until 1966, when FPC specifically requested both Tapoco and Nantahala to file it. Both filings were made "under protest" (subject to their right to contest the FPC's authority to regulate any aspect of the NFA) since the other principal party, TVA, was not subject to FPC regulation (App. p. 29a).

[12] For a lengthy discussion of all the detriments to Nantahala arising out of both the NFA and the 1971 Apportionment Agreement, please refer to App. pp. 179a-205a.

reallocation of return power from the NFA, Nantahala was required to enter into an expensive supplemental power purchase contract with TVA.[13] (App. pp. 30-36a).

18. Since 1971, Nantahala has been required to purchase ever-increasing amounts of high cost power from TVA to serve its public load, even though Nantahala's own generation frequently exceeded its public load requirements[14] (App. p. 32a).

19. Based on the foregoing historical facts, the NCUC made the four fundamental findings of fact upon which its decision to use the roll-in ratemaking methodology was predicated. See page 2, *supra*. These facts, which are binding on appeal and do not involve any federal questions, concern the single Nantahala-Tapoco system, the public utility status of Alcoa and Tapoco, and Alcoa's domination of Nantahala.[15] Appellees impose upon the

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[13] The 1971 Agreement was not filed at FERC until 1980, once again under protest (App. p. 31a). Thus, if for no other reason, the NCUC is not preempted because the 1971 Agreement was not a "filed rate" during the test year in this case, 1975.

[14] For example, during the 1975 test year in this case, Nantahala's actual generation was about 560,000,000 kwh and its public load was only slightly above 450,000,000 kwh. Despite this, Nantahala was required to purchase an additional 81,265,370 kwh from TVA, at a cost of $1,500,000 (Appellants' App. p. 31a).

[15] Contrary to the assertion of Alcoa and its allies, this case does *not* involve a jurisdictional dispute between North Carolina and Tennessee. (Tennessee ceased regulating Tapoco (or Knoxville), at the latest, in 1955 when Tapoco sold its public load distribution systems.) The dispute *is* between the reasonable needs of Nantahala's public load versus Alcoa's ongoing attempts to accord preferences to itself through manipulation of its subsidiaries. It is the fact of Alcoa's status as Nantahala's sole stockholder, as a North Carolina public utility and its domination of Nantahala, for Alcoa's benefit, not the alleged fact of Alcoa's status as a "Tennessee customer", that resulted in Alcoa being held jointly liable for the refund amounts (App. pp. 230a-233a).

Court's time for this lengthy recitation of facts for one crucial reason. The facts demonstrate that the historical development of the "Alcoa power system" is unique in the electric power industry. The "Alcoa power system" cannot be compared to other, traditional electric utilities, whether they be individual utilities like Duke Power Company or holding company systems like Middle South Utilities.[16] For these reasons, the final result reached in this case cannot be extended to the electric power industry generally.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellees move to dismiss the Ap-

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[16] For example, in none of the other, more traditional power systems is the parent corporation engaged in a principal business separate from the production, transmission and distribution of electric power. In none of them is the parent the largest customer of the power system. In none of them has the veil of corporate separateness between parent and subsidiary been pierced. In none of them is there a consistent history of the parent's attempt to avoid reasonable state and federal regulation and to "cut away" power resources originally dedicated to serve the public to the sole and exclusive benefit of the parent's manufacturing operations. In its *Amicus Curiae* brief, Edison Electric Institute (EEI) largely ignored the factual basis of the NCUC's decision. For example, on p. 5 of its brief, EEI states that "Nantahala and Tapoco are separate corporations," completely ignoring the NCUC's finding that they constitute a single system for ratemaking purposes. However, EEI does appear to concede, in the hypothetical assumptions on p. 12 of its brief, that the true facts of this case are not those about which EEI or its members might properly be concerned. Dismissal of the present appeal or affirming the judgment of the North Carolina Supreme Court will not affect EEI or its traditional utility members.

peals of Alcoa, Tapoco and Nantahala for the reason that they present no substantial federal questions. In addition, Appellees move to affirm the Judgment and Opinion of the North Carolina Supreme Court on the ground that such opinion, based upon the facts determined below, was correctly decided. Finally, Appellees contend that the Appeal should not be favorably treated, alternatively, as a Petition for Writ of Certiorari and that a Writ of Certiorari should not issue.

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ARGUMENT

I. The order of the North Carolina Utilities Commission, as affirmed by the North Carolina Court of Appeals and the North Carolina Supreme Court, does not present a substantial federal question.

The Companies have now argued their federal questions before the NCUC and both of the North Carolina Appellate Courts. In the longest opinion in its two hundred year history, the North Carolina Supreme Court treated the federal questions exhaustively. Despite the depth of examination and treatment of the various federal questions, the North Carolina Supreme Court had no difficulty in disposing of these questions adversely to Appellants, because it is obvious that their arguments and the cases upon which they rely are just not applicable to the unique factual circumstances of this case. This is *not* a case where the NCUC disallowed FERC-approved wholesale power costs on the grounds that such costs were unreasonable. Instead, the Commission considered and allowed all relevant costs in the single-system "pot" and allocated

the proper portion of such rolled-in costs, using traditionally accepted allocation methods, to the Nantahala retail load.

Appellants' arguments are, in brief summary, predicated upon assumed facts that: (1) Nantahala is a "stand alone" utility; (2) Tapoco is not a North Carolina public utility; (3) Alcoa is not a North Carolina public utility for any purpose; and, (4) Alcoa has not dominated its subsidiaries so as to compel a piercing of the corporate veil. Such arguments are premised on a set of facts as Appellants want them to be, rather than what they really are, with the inevitable consequence that their arguments collapse when meeting the actual facts, as found by the NCUC and affirmed on appeal. We address each of Appellants' major legal arguments hereafter.

A. The Roll-In Is Not Barred By Part II Of The Federal Power Act.

The Companies argue that the NCUC's roll-in is contrary to the federal preemption doctrine under Article VI, Clause 2 of the United States Constitution, as applied to Part II of the Federal Power Act (16 U.S.C. § 824, *et seq.).* Several cases are cited as illustrative of the impermissible parameters of the roll-in. However, these cases are distinguishable in that the various state commissions disallowed actual costs arising from filed rates, while in the roll-in methodology at hand, all costs properly arising from the FERC-filed rates were considered in the single Nantahala-Tapoco system. In addition, all of these cases involved traditional electric public utilities and holding companies, not the unique facts of the "Alcoa power system."

1. The FERC's Opinions Do Not Preclude Roll-In As Applied By The NCUC.

The NCUC's roll-in decision sets Nantahala's retail rates in a way that redresses the corporate abuse which the NCUC found among three affiliated North Carolina public utilities — Alcoa, Tapoco and Nantahala. The NCUC looked through this needlessly complex corporate structure to find a single, integrated Nantahala/Tapoco system and Alcoa domination of Nantahala. In light of these findings, the NCUC rolled-in the costs of the two companies and allocated them, using a traditional ratemaking allocation methodology.[17] As noted by the North Carolina Supreme Court, this methodology is commonly employed in setting the retail rates for utilities operating in more than one state. *Utilities Commission v. Edmisten*, 313 N.C. 614, 332 S.E.2d 397 (1985), (App. p. 55a). The NCUC rejected the methodology proposed by Nantahala and Alcoa — allocation of *single system costs* along the lines of the *separate system* NFA and 1971 Apportionment Agreement — because in entering into these Agreements, Nantahala had been compelled to give up benefits and to incur unnecessary costs solely to benefit Alcoa. Such costs did not benefit the retail customers.

When faced with contemporaneous requests to use the roll-in methodology for setting rates to Nantahala's three wholesale customers (7% of NP&L's public load), FERC declined to exercise its § 205 ratemaking (legislative) discretion to do so. *Nantahala Power and Light Company*, Opinion No. 139, 19 F.E.R.C. ¶ 61,152; *reh'g denied*, Opinion No. 139-A, 20 F.E.R.C. ¶ 61,430; Opinion No. 139-B, 21 F.E.R.C. ¶ 61,222 (1982); *aff'd*, *Nantahala Power and Light Company v. FERC*, 727 F.2d 1342 (4th Cir. 1984). FERC did determine that the 1971 Apportionment Agreement was unfair to Nantahala, but it declined to reform the Agreement and set Nantahala's *wholesale rates* as if Nantahala had received 44 million kwh more of the TVA return energy (from the NFA) than it was entitled to receive pursuant to the 1971 Agreement.[18] Without such reformation, NP&L's retail customers could not (and did not) benefit from FERC's determination that the 1971 Apportionment Agreement was unfair. Based upon this discretionary exercise of FERC's *legislative* (ratemaking) authority, Appellants now contend that the NCUC's decision unlawfully invades a domain exclusively occupied and preempted by the FERC.

[17] Costs were allocated to the Nantahala retail load based upon the retail load's actual energy and demand requirements as a proportion of the total Nantahala and Tapoco single system requirements.

As to Appellants' first preemption argument—that FERC's decision not to employ roll-in to set wholesale rates precluded the NCUC from using roll-in—the FERC explicitly recognized that the NCUC, operating under discrete State criteria, could validly require roll-in for setting *retail* rates. FERC stated, after having a full opportunity to review the NCUC's September 2, 1981 decision (which had been lodged before it):

> We recognize that the North Carolina Utilities Commission ("NCUC"), based on a similar record, reached a different conclusion concerning roll-in costing. However, *the question of whether to treat various entities as an integrated system for ratemaking purposes is not a purely factual question but also rests on criteria which each ratemaking authority may deem relevant* (Emphasis supplied).

[18] App. pp. 293a, 295a, 298a, 309a, 311a.

App. p. 305a. FERC thus recognized that use of roll-in by the NCUC, in its exercise of retail ratemaking authority, does not conflict with FERC's decision.[19]

FERC correctly noted the independence of Federal and State ratemaking determinations. It has been repeatedly recognized that Federal and State regulatory commissions can adopt different ratemaking policies. *See, e.g., Mid-Tex Electric Cooperative, Inc. v. FERC*, No. 83-2058, slip op. at pp. 50-61 (D.C. Cir. Sept. 24, 1985); *Public Systems v. FERC*, 709 F.2d 73, 84 (D.C. Cir. 1983). Roll-in is no special exception to this rule, as FERC itself recognized (App. p. 305a). Contrary to the impression Appellants seek to convey, in several important respects the NCUC's methodology was *more favorable* to Nantahala than FERC's. FERC disallowed the non-fuel component of Nantahala's purchased power adjustment clause (the entire clause was acceptable to the NCUC) and FERC rejected Nantahala's treatment of wartime depreciation (which had been approved by the NCUC). In addition, the NCUC used a fair value rate base and a different rate of return than FERC.

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[19] In view of FERC's specific holding just quoted, the positions taken by the Solicitor General and counsel for FERC in their *Amicus Curiae* brief are inexplicable. They obviously are in conflict with the position previously taken by FERC. Counsel for the FERC now, apparently, contends that FERC was wearing its administrative (or § 206) "hat" in Opinion 139 and that FERC specifically approved the cost and power allocations arising from the NFA and the 1971 Agreement. The Fourth Circuit, in affirming FERC's opinions, clearly understood that FERC was not acting administratively, but was wearing its broader, more discretionary, legislative (ratemaking) "hat". The Fourth Circuit stated: "While . . . this evidence does suggest a basis for the Commission to order rolled-in costing, it does not compel the conclusion that the Commission must, as a matter of law, consolidate costs for ratemaking purposes. A decision to order roll-in is essentially a matter of Commission discretion . . ." *Nantahala Power and Light Co. v. FERC*, 727 F.2d 1342, 1348 (4th Cir. 1984).

The two Commissions viewed the issues confronting them in distinctly different ways when making their disparate ratemaking determinations as to roll-in. The NCUC was not dealing with the stated FERC issue of whether "Alcoa has used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act" (App. p. 290a). Instead, the NCUC was concerned with whether fair and reasonable retail rates could be established if Nantahala were viewed as a "stand alone" company (App. p. 137a). FERC cannot lawfully preclude North Carolina from making that decision, in setting retail rates, as FERC openly acknowledged (App. p. 305a).

Appellants' second preemption argument is that, even if retail roll-in is technically permissible, the NCUC is still not free to interfere with the Alcoa-directed "allocation" of power entitlements between the two distinct loads served by the single system: Nantahala's public load and Tapoco's industrial load. This argument asserts that, because Alcoa deliberately created or acquired two seperate utility companies (where one would have sufficed) and directed them to enter into allocation transactions, some of which were belatedly filed at FERC,[20] the NCUC was precluded from using roll-in to protect North Carolina retail customers

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[20] The 1941 OFA was never filed for FERC approval during its 20 year life *(Tapoco, Inc., et al.,* 30 F.E.R.C. ¶ 65,050 at ¶ 65,274). Neither was the 1954 Apportionment Agreement *(Id.* 30 F.E.R.C. at ¶ 65,275). Neither was the 1963 Apportionment Agreement *(Id.* 30 F.E.R.C. at ¶ 65,277). The NFA, which became effective in January 1963, was not filed until 1966 and it was filed "under protest"—i.e., subject to NP&L's and Tapoco's right to contest F.E.R.C.'s jurisdiction over the NFA (App. p. 29a). Finally, the 1971 Apportionment Agreement was not filed as a tariff until 1980 (App. p. 31a). *Nantahala Power and Light Co.,* 2 FPC 388 (1941) also discusses Alcoa's strenuous attempts to avoid federal regulation of its subsidiaries' hydroelectric projects.

from the corporate abuse it found among the three North Carolina public utilities.

Alcoa's second argument can best be examined by observing FERC's treatment of the NFA and the 1971 Agreement for ratemaking purposes. The ultimate issue in Opinion 139 was the justness and reasonableness of Nantahala's request for a 28% wholesale rate increase. FERC did not review the two Agreements for their independent "justness and reasonableness" under § 206 of the Federal Power Act (i.e., FERC was not wearing its regulatory or administrative "hat"). Rather, FERC viewed the fairness of the Agreements only under § 205 of the Act, for the limited purpose of determining the reasonableness of Nantahala's proposed wholesale rates. In this limited context, FERC did not accept the contention that Alcoa, through the OFA or the NFA, intentionally deprived Nantahala of adequate hydroelectric generating facilities (App. p. 295a). However, FERC found that "the apportionment agreements are another matter" (App. p. 295a). The FERC specifically found that "the 1971 Agreement is unfair" (App. p. 293a) and that, in entering such Agreement, Nantahala gave up substantial benefits contained in its 1963 Agreement with Alcoa, without consideration (App. pp. 295-296a). FERC then determined that, regardless of the provisions of the 1971 Apportionment Agreement, Nantahala should be required to use a fairer level of entitlements in developing its costs for wholesale ratemaking purposes. With regard to the refund of excessive wholesale rates collected by NP&L, FERC held that Nantahala should refund any amounts collected in excess of those payable by the customers if Nantahala had been fairly treated in the 1971 Agreement (App. p. 298a).

FERC expressly declined to exercise its authority to reform the 1971 Apportionment Agreement to reflect the increased Nantahala entitlements it had found appropriate for purposes of setting Nantahala's wholesale rates and stated: "Our decision here does not reform the 1971 Agreement . . . The effect of this opinion is to provide entitlements to Nantahala which will result in just and reasonable rates to its wholesale customers" (App. p. 298a). In its Opinion on Rehearing, FERC again acknowledged that it ". . . did not choose to reform the 1971 Apportionment Agreement" (App. p. 309a). In short, in determining the just and reasonable rates to be charged Nantahala's wholesale ratepayers, FERC did not reform the filed rates. Instead, it established Nantahala's wholesale rates *as if* the 1971 Agreement had been reformed, by awarding NP&L an additional 44,000,000 kwh annually, in order to fix rates which FERC deemed fair to Nantahala's wholesole customers. FERC's approach is analogous to the NCUC's, which in no way revised or reformed the actual contractual relationships—the flow of power and dollars among TVA and the North Carolina utilities. Through its employment of roll-in and a conventional cost allocation methodology, the NCUC merely assured that Nantahala's ratepayers did not pay excessive rates. Obviously, if FERC had intended to approve the NFA and the 1971 Agreement for purposes of power and cost allocation (as opposed to ratemaking), it would have been required to reform the 1971 Agreement. Only such a direct reformation would benefit *all* of Nantahala's customers.

The great intentions of Congress in the Federal Power Act—to protect the consumer, to fill the *Attleboro*[21] gap,

[21] *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

and to respect the role of the States in retail rate regulation—cannot be converted into a requirement that, under the unique factual circumstances present here, would result in clear oppression of the retail ratepayers. Federal preemption was never intended to require retail ratepayers to pay rates which would be unreasonable under the findings and reasoning of both the FERC and the NCUC (Appellants do not even specify the preemption standard to which the NCUC is to be held—the "filed rates" *per se*, or the filed rates as adjudicated (but not reformed) by FERC.) FERC's limited determination not to roll-in Nantahala and Tapoco for wholesale ratemaking purposes does not preempt the NCUC from ordering a retail roll-in based upon North Carolina law and other criteria which the NCUC deemed relevant (App. p. 305a).

2. The NCUC's Determination Does Not Conflict With The "Narragansett Doctrine."

As their third preemption argument under the Supremacy Clause—that the NCUC improperly reallocated both power and costs in violation of the filed-rate doctrine—Appellants attempt to twist the facts of this case into the mold of the *"Narragansett-Northern States"* line of preemption cases,[22] upon the assumption that Opinion 139 actually allocated power and costs. As we have just shown, however, FERC *did not* allocate power and costs with respect to the NFA and the 1971 Apportionment Agreement. Actually, the orders of the NCUC are entirely consistent with the filed-rate doctrine, under which

[22] *Narragansett Electric Co. v. Burke,* 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied,* 435 U.S. 972 (1978); *Northern States Power Co. v. Hagen,* 314 N.W.2d 32 (N.D. 1981); *Northern States Power Co. v. Minnesota Public Utilities Commission,* 344 N.W.2d 374 (Minn. 1983), *cert. denied,* 104 S.Ct. 3546 (1984).

a State retail order is invalid if it interferes with an actual or potential FERC determination as to the justness and reasonableness of a wholesale rate or an interstate electric power transaction. Some State courts, as noted by Appellants, have held that a State Commission may not disallow a FERC-approved wholesale power cost on the basis of a determination that the FERC-approved rate was unreasonable.[23] Other courts have struck down retail rate orders that interfered with FERC orders allocating the costs of certain nuclear generating facilities among affiliated utilities.[24] In each of those cases, however, the

[23] *Narragansett Electric Co. v. Burke, supra,* (State commission engaged in searching inquiry into wholesale supplier's costs and concluded that the wholesale rates charged to and paid by local utility for purchased power were excessive); *United Gas Corp. v. Mississippi Public Service Comm'n,* 240 Miss. 405,127 So. 2d 404 (1961) (State commission refused to allow wholesale purchased gas expenses in retail rates because FTC had not yet determined whether they were just and reasonable; *held* that State commission must allow the expenses to be collected in retail rates, subject to refund, pending FPC determination); *City of Chicago v. Illinois Commerce Comm'n,* 13 Ill. 2d 607, 150 N.E. 2d 776, 780-81 (1958); *Citizens Gas Users Ass'n v. Public Utilities Comm'n of Ohio,* 165 Ohio 536, 138 N.E. 2d 383 (1956) (State commission cannot disallow as unreasonable from retail operating expenses the cost of gas purchased at wholesale under FPC-jurisdictional tariffs); *Office of Public Counsellor v. Indiana & Michigan Electric Co.,* 416 N.E. 2d 161 (Ind. App. 1981) (State commission reversed when it consolidated a retail electric utility and a wholly-owned nuclear subsidiary, and set a single rate of return for the rolled-in assets, when the result was to eliminate the higher rate of return fixed by the FERC for the wholesale electric rates charged by the subsidiary to the parent).

[24] *Northern States Power Co. v. Minnesota Public Utilities Comm., supra; Northern States Power Co. v. Hagen, supra* (affiliated utilities allocated canceled nuclear plant costs between themselves by means of a wholesale bulk power sales contract, filed with and litigated before the FERC; *held* that State Commissions could not set the retail rates of these uilities so as to alter or interfere with the FERC's determination of the just and

(Continued on next page)

State orders were clearly intended to frustrate a prior or anticipated FERC order allocating such costs.

The NCUC order here being challenged is not controlled by either of the foregoing line of cases because (a) the NCUC did *not* base its roll-in order on a determination that a wholesale filed rate approved by, modified by or being litigated at the FERC was unreasonable, and (b) the NCUC did *not* interfere with a FERC § 206 allocation of costs among States or among utilities. Rather, the NCUC set Nantahala's retail rates on the basis of its determination of which of the Nantahala-Tapoco single system's total costs—including *all* costs incurred pursuant to the NFA and the 1971 Apportionment Agreement—could fairly be considered to have been incurred for the benefit of Nantahala's retail customers. Several courts which have addressed fact and policy situations analogous to the facts presented here have ruled that the *Narragansett-Northern States* doctrine does *not* require States to charge retail customers for costs which were not reasonably incurred to serve them.

In *Public Service Co. of Colorado v. Public Utilities Comm. of Colorado*, 644 P.2d 933 (Colo. 1982), the Colorado Supreme Court reviewed an order of the Colorado PUC regarding the retail treatment of FERC-approved

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reasonable allocation of those costs). *Eastern Edison Co. v. Department of Public Utilities*, 388 Mass. 292, 446 N.E. 2d 684 (1983) (wholesale rates paid by retail utility included wholesale supplier's costs of abandoned nuclear plant); *See also Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, Nos. 84-2409, *et al.* (8th Cir., August 23, 1985) (enjoining State attempt to prevent a utility from including costs of the Grand Gulf nuclear facility in its retail rates, despite FERC orders allocating those costs between the utility and affiliated utilities in other States, belonging to the same holding company system, pursuant to a series of FERC-jurisdictional interstate bulk power contracts; Court relied on a burden on interstate commerce analysis, but indicated possible preemption problems as well).

costs of participation in the Gas Research Institute ("GRI"), an industry-wide natural gas R & D program. The Colorado Commission agreed that it had to treat these costs as reasonably incurred operating expenses. However, it stated that, under the *Narragansett* rule[25] it was free to determine whether those costs should be automatically passed through in retail rates. The Colorado Commission questioned the propriety of forcing retail customers to bear this expense, because the customers would exercise no control over the expenditure of GRI funds, and customers would benefit from GRI's activities only in the future, if at all, with most of the potential benefits going to the gas utilities themselves, to energy development corporations, and to other private interests.

The Colorado Commission's decision was upheld by the Colorado Supreme Court, which agreed that these expenses need not be passed through automatically to consumers. The Court concluded that the Colorado PUC had the authority to scrutinize such costs in a general retail rate case "to balance the interests of utility investors and the ultimate consumers in arriving at a just and reasonable rate . . ." *Public Service Co. of Colorado v. Colorado PUC*, *supra*, 644 P.2d at 941.[26]

[25] In *Narragansett, supra*, 381 A.2d at 1363, the Rhode Island Supreme Court required the Commission to treat a utility's wholesale power purchase from an affiliate pursuant to a FERC rate schedule as an actual, reasonable operating expense, but also held that the Commission need not allow the expense to be flowed through automatically to retail customers by means of a purchased power adjustment clause.

[26] See also *Eastern Edison Co. v. Department of Public Utilities*, 388 Mass. 292, *supra*, where the Massachusetts Supreme Judicial Court discussed with apparent approval the above holdings of the Rhode Island Supreme Court in *Narragansett* and of the Colorado Supreme Court in *Public Service Co. of Colorado*, distinguishing them on the grounds that the Massachusetts statute specifically required automatic flow-through of all reasonably incurred fuel and purchased power expenses.

Washington Gas Light Co. v. Public Service Comm. of the District of Columbia, 452 A.2d 375 (D. C. 1982), *cert. denied,* 462 U.S. 1107 (1983) is similar. The Court reversed the D.C. Commission, however, because it found that the Commission's decision was based on the preempted conclusion that the wholesale increase was unreasonable, not on the permissible conclusion that the expenses, even though reasonable, should not be passed along in retail rates.

A recent decision by the New Hampshire Supreme Court is consistent with this line of authority—that while a State Commission may not review FERC-approved rates for their reasonableness, it is free to determine, under state law, whether the wholesale costs should be flowed through in retail rates. *Appeal of Sinclair Machine Products, Inc., et al.,* — N.H. —, Case No. 84-380 (issued July 26, 1985). In the *Sinclair* case, Connecticut Valley Electric Company ("CVEC") filed a general retail rate increase. A major portion of CVEC's increase was based upon the wholesale rates which CVEC paid to its power supplier, Central Vermont Public Service Corporation ("Cen. Vt."). CVEC was a wholly-owned subsidiary of Cen. Vt. Pursuant to a unilateral settlement agreement proposed by Cen. Vt., FERC approved the wholesale rates charged by Cen. Vt. to CVEC. Such rates included a pass-through of Cen. Vt.'s cost of two abandoned nuclear plants. Inclusion of these costs in CVEC's retail rates was challenged on the basis of New Hampshire's anti-CWIP statute.

The New Hampshire PUC ruled that FERC's approval precluded it from disallowing any portion of the wholesale rate. The New Hampshire Supreme Court reversed and remanded. It held that, while the preemption doctrine precluded the PUC from disapproving the wholesale rate (despite the state's anti-CWIP statute), the PUC was free to inquire into the reasonableness of CVEC's purchases from Cen. Vt. in light of other purchase options

available. The case was remanded to the PUC to make this inquiry. The Court also observed (Slip. Op., p. 2):

> The central question before the PUC in a retail rate case such as this is whether costs incurred under a wholesale rate, which has been approved as being a just and reasonable *charge* by the wholesaler, are just and reasonable *operating expenses* of the retail utility . . . The PUC never reached this question (Emphasis supplied by the Court).[27]

Accord, Pike County Light and Power Co. v. Pennsylvania Public Utility Commission, 77 Pa. Commw. Ct. 268, 465 A.2d 735 (1983). The NCUC's roll-in is similar to the Colorado and New Hampshire cases. The NCUC, in substance, determined that some of Nantahala's costs were imprudent in view of the alternatives available from the single system.

What most fundamentally separates the present case from the *Narragansett/Northern States* line, however, are the unique facts of this case. While some of the cases cited by the Appellants do involve cost allocations among the affiliated entities of a holding company system, in none of these cases do we find the circumstances of intercorporate abuse which are present here. See footnote 16, *supra.* These unique factual circumstances make *Narragansett/Northern States* and their progeny simply inapplicable to the present case.

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[27] Interestingly, the *Sinclair* case is cited by EEI in its *Amicus Curiae* brief for the proposition that the issue of whether or not to pierce the corporate veil between affiliated utilities rests solely and exclusively with FERC (EEI brief, pp. 12-13). EEI has misread the *Sinclair* opinion. Properly viewed, the New Hampshire Court is merely observing the obvious—only FERC may decide whether to pierce the corporate veil in setting wholesale rates. This is clear, and clearly does not address the right of a State Commission to pierce the corporate veil in setting retail rates.

B. The Roll-in Is Not Barred by the Commerce Clause

For their final preemption argument, Appellants attempt to hide Alcoa's intercorporate abuses behind the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3) as applied in the case of *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982) (hereafter, "NEPCO"). They rely on NEPCO for the proposition that the roll-in, as applied by the NCUC, exclusively reserves North Carolina hydroelectric power produced by Nantahala and Tapoco for North Carolina ratepayers, in violation of the Commerce Clause. To the contrary, the roll-in methodology of setting rates merely allocates to the North Carolina retail jurisdiction its appropriate share of the costs of a single utility system operating in more than one state. None of the hydropower (or the economic benefits therefrom) is exclusively reserved to North Carolina.[28]

By its orders in this case, the NCUC has neither directly nor indirectly prohibited the export of electric power (or "economic benefits") from North Carolina. Not one word of the NFA or the 1971 Agreement has been changed. Not one electron of power of energy has been diverted. In contrast to NEPCO, the roll-in approved by the NCUC operates evenhandedly, on a two-way street. Assuming *arguendo,* that Appellants are correct (which Appellees do not concede) in their assertion that the roll-in shifts "economic benefits" away from Tapoco to Nantahala, the roll-in similarly shifts economic benefits from Nantahala to Tapoco. Specifically, Nantahala is allocated approximately 25% of the costs of the single Nantahala-Tapoco system (and, presumably, any attendant benefits). The other 75% are, by implication, allocated to Tapoco. In NEPCO, the process was a one-way street. New Hampshire received lower electric costs but did not give up anything. In addition, in NEPCO there was no predicate for holding the single-system stockholder/parent liable for its domination and abuse of its subsidiaries. NEPCO is no more relevant to the unique facts of this case than *Narragansett* or *Northern States.*

[28] The Appellants (and their allies) have spared no opportunity to emphasize the NCUC's unfortunate misstatement to the effect that the roll-in methodology is based on the assumption that Nantahala's retail ratepayers are entitled to a preference (or "first call") on the total power and energy belonging to the single Nantahala-Tapoco system. (J.S., p. 9; App. pp. 182-183a). The opinion of the North Carolina Supreme Court (App. pp. 101-102a) clearly shows that Appellant's have taken the NCUC's statement out of context. If the NCUC had, in fact, awarded a "first call' or a preference to Nantahala's retail customers, Nantahala's rates would have been further reduced and the refunds required would have been even higher. By allocating "average" costs out of the Nantahala/Tapoco single system, the NCUC did not give a preference to anyone.

If applicable at all, NEPCO approves rather than forbids the NCUC's roll-in methodology. Were the argument of Appellants (and the State of Tennessee as *Amicus Curiae)* carried to its logical conclusion, we would have NEPCO in reverse. Appellants seek a result which would require *all* (not merely some) of Tapoco power from its Cheoah and Santeetlah (N.C.) dams to be exported to Tennessee, while at the same time requiring that *none* of Tapoco's power from its Chilhowee and Calderwood (Tenn.) facilities be allowed to leave Tennessee. It is Alcoa and its allies, not the Appellees, who are arguing in favor of economic protectionism.

The North Carolina Supreme Court acknowleged and distinguished NEPCO. It also held that any impact of the roll-in on interstate commerce is both incidental and negligible. As the North Carolina Supreme Court stated (App. pp. 105-106a):

Again, the roll-in, as employed by the Commission, does no more than establish the overall cost of operation of a single, unified Nantahala-Tapoco system and allocates the proper portion of those costs to North Carolina retail customers for the purpose of fixing just and reasonable rates for Nantahala. Such even-handed and traditional rate making operations do not implicate the national concern with 'economic protectionism' discussed in the BRUCE CHURCH[29] case. Moreover, the setting of retail electric rates for Nantahala's customers is clearly a legitimate North Carolina interest with a significant impact in this state. Not a word of the contracts or agreements properly regulated by FERC has been changed, and the fact that the price charged by Nantahala to its retail customers may have some *de minimis*, incidental effect on the price structure of the interstate 'grid' of which Nantahala is a part is not clearly excessive in relation to the substantial public interest in the establishment of just and reasonable electric rates for ultimate North Carolina consumers. See *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm.*, 461 U.S. 375, 76 L.Ed. 2d 1. Accordingly, we conclude that the Commission's order does not impose an undue burden on interstate commerce and is not, therefore, prohibited by the Commerce Clause of the United States Constitution.

Appellants also argue that the outcome of this case is governed by the result in ***Middle South Energy, Inc. vs. Arkansas Public Service Commission,*** — F.2d — (Nos. 84-2409, *et al.*, 8th Cir., August 23, 1985). This case is similar to the two *Northern States Power Co.* cases, ***supra,*** except that the Eighth Circuit, in contrast to the State Courts, decided the case on the basis of the Commerce Clause, rather than federal preemption under Part II of the Federal Power Act. As we have previously shown, application of the preemption doctrine is improper here because the Orders of the NCUC, in setting retail rates for

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[29] *Pike v. Bruce Church*, 397 U.S. 137 (1970).

Nantahala, do not conflict with the wholesale rate orders of FERC. The clear intent of the Arkansas PSC was to declare the FERC-mandated cost allocations of the Grand Gulf nuclear power station void *ab initio*. Here, the NCUC allowed all relevant costs arising from the NFA and the 1971 Apportionment Agreement into the ***single system "pot" of costs.*** Finally, the *Middle South* case did not involve parental abuse of the relationship between itself and its subsidiaries whereby the parent directly benefited, in its separate manufacturing operations, to the significant detriment of the subsidiary's customers. For these reasons, *Middle South* is simply inapplicable to the facts of this case.

The NCUC's purpose in ordering roll-in and holding Alcoa partly responsible for the refunds is to serve the important state interests of effectively regulating North Carolina public utilities and assuring just and reasonable rates for retail customers, free from the costs of imprudent, self-serving actions imposed on Nantahala by the self-dealing of its sole stockholder. Contrary to Alcoa's claims, the NCUC's retail rate order has neither an economic protectionist purpose nor an intent to regulate interstate commerce. Thus, the NCUC's orders serve legitimate and substantial local interests, with only incidental effects on interstate commerce, and they do not raise any substantial questions under NEPCO or the Commerce Clause.

CONCLUSION

Based on the specific and unique facts of this case, Appellees urge and contend that the NCUC order appealed from, as upheld by both the North Carolina Court of Appeals and the North Carolina Supreme Court, raises no

substantial federal questions because (1) the NCUC decision and the FERC decision are not in conflict and (2) this case does not involve a protectionist fight between North Carolina and Tennessee; it is a simple economic dispute between Nantahala's retail customers and the private, selfish interests of Nantahala's dominating parent, Alcoa. As a result, this Court should decline to note probable jurisdiction of the case. The Appeals should be dismissed and this Court should not review the case by way of Certiorari; alternatively, the judgment of the North Carolina Supreme Court should be affirmed *Per Curiam*.

Respectfully submitted, this the 19th day of November, 1985.

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